Supreme Court, U.S.
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In THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

JOHN FRESSIE,

Petitioner,

v.

TRANS WORLD AIRLINES, DIANA MAGADAN, Individually,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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44

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that John Fressie's claims against Trans World Airlines of False Arrest, Malicious Prosecution and Breach of Contract are pre-empted under the terms of the Airline Deregulation Act, 49 U.S.C.A. § 1301 et seq?

LIST OF ALL PARTIES

JOHN FRESSIE	Petitioner and plaintiff below
TRANS WORLD AIRLINES	Respondent and defendant below

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(The District Court's Ruling on Respondent's Motion for Summary Judgment Appears as Appendix B Herein).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

(The decision of the Third Circuit Court of Appeals affirming the District Court's opinion and judgment appears as Appendix A herein).

JURISDICTION

This matter is properly brought before this Court due to conflicting decisions rendered in both the Circuit Courts of Appeals and the State Courts.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) on the grounds that the United States Court of Appeals for the Third Circuit has decided a federal question in a way that conflicts with the applicable decisions of this Court, and that the case presents an important question of federal law which should be decided by this Court.

The final Judgment of the United States Court of Appeals for the Third Circuit was entered July 6, 1994. This petition for certiorari is filed within the period permit by the Rules of Court.

STATUTORY PROVISION

49 U.S.C.A. § 1305 et. seq. provides as follows:

(a) **Preemption**
(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

(b) **Proprietary powers and rights**
(1) Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

(2) Any aircraft operated between points in the same State (other than the State of Hawaii) which in the course of such operation crosses a boundary between two States, or between the United States

and any other country, or between a State and the beginning of the territorial waters of the United States, shall not, by reason of crossing such boundary, be considered to be operating in interstate or overseas air transporation.

(c) **Existing State authority**
When any intrastate air carrier which on August 1, 1977, was operating primarily in intrastate air transportation regulated by a State receives the authority to provide interstate air transportation, any authority received from such State shall be considered to be part of its authority to provide air transportation received from the Board under subchapter IV of this chapter, until modified, suspended, amended, or terminated as provided under such subchapter.

(d) **Definition**
For the purposes of this section, the term "State" means any State, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, and any territory or possession of the United States.

STATEMENT OF THE CASE

This action was commenced by the Petitioner for damages sustained when Respondent arrested and prosecuted him after it refused to honor the ticket and boarding pass it had issued on October 6, 1988 for its flight 800, Kennedy Airport, New York to Paris France the evening of October 15, 1988.

Petitioner filed a complaint in the Superior Court of New Jersey, Law Division, Passaic County on March 23, 1989. The complaint set forth causes of action for false arrest, malicious prosecution, breach of contract and punitive damages.

A timely Petition for Removal was filed by the Respondent with the United States District Court for the District of New Jersey on May 1, 1989. Issue was joined with the filing of an answer by Respondent on May 5, 1989.

The parties mutually agreed to discontinue the action against Respondent's employee, Diana Magadan, individually with the recognition by Respondent that Magadan was acting, at all times, within the scope of her employment with Respondent. The stipulation and Order, signed by the Honorable Maryanne Trump Barry, was filed with the District Court on December 22, 1989.

After considerable discovery was conducted by both parties and the matter was on Judge Barry's trial calendar, Respondent filed for summary judgment on November 1, 1991. It contended that the Petitioner's causes of action were preempted by federal legislation or, in the alternative, that Respondent had a duty to remove an allegedly obstreperous passenger from its aircraft. It also asserted that if the Court should not rule in its favor, then, at a minimum, Petitioner was limited to a ten dollar recovery because of tariff regulations.

The district court did not entertain oral argument on

Respondent's motion for summary judgment. An opinion of the District Court (Barry, D.J.) was rendered, granting Respondent's summary judgment application and filed on December 23, 1991. (See Appendix B.)

The Court thereafter entered an Order on December 23, 1991 granting Respondent's motion for summary judgment. (See Appendix C). An appeal followed to the United States Court of Appeals, for the Third Circuit, with the timely filing of a Notice of Appeal by Petitioner on January 17, 1992.

The Third Circuit rendered its opinion in this matter on July 6th 1994. (See Appendix A). The Court of Appeals affirmed the District Court's conclusion that Petitioner's tort claims were preempted and while agreeing that the district court erred in dismissing Petitioner's breach of contract claim, concluded that it was nevertheless preempted by federal law.

ARGUMENT FOR GRANTING THE WRIT

I.

INTRODUCTION

This Court has stated that the purpose of certiorari is to permit it to "resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law." Braxton v. United States, 111 S. Ct. 1854, 114 L. Ed. 2d. 385 (1991). It is Petitioner's position that his state claims of false arrest and malicious prosecution as well as breach of contract do not fall within the scope of the preemption provision as set forth in 49 U.S.C.A. § 1305. This Court has rendered one opinion regarding this provision. The majority of the decisional law that has been rendered since this Court's ruling supports the Petitioner's position. Therefore, the lower courts erred in dismissing and affirming the dismissal of Petitioner's complaint.

II

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CONFLICTS WITH THE APPLICABLE DECISION OF THIS COURT

The Airline Deregulation Act codified at 49 U.S.C.A. 1301 et. seq., prohibits the States from enacting or enforcing "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." 49 U.S.C.A. 1305(a)(1) (West 1994). On June 1, 1992, this Court rendered a decision addressing the preemptive scope of this statutory provision. Morales v. Trans World Airlines, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992).

In Morales, the National Association of Attorneys General (NAAG), adopted Air Travel Industry Enforcement Guidelines which were intended to prevent deceptive practices laws in airline advertising. The Guidelines specifically provided for the manner in which an airline could advertise, award premiums to its customers, and, pay compensation to customers who voluntarily yielded their seats on overbooked flights. Id. at 2031. The Guidelines clearly sought to control the airline industry business. The airlines then filed suit, claiming that the Guidelines violated the preemption provision in that they related directly to the "rates, routes, and services" of the carrier.

This Court concluded that the Guidelines were preempted by section 1305(a)(1). Provisions requiring advertising disclosure of fare terms, restrictions and availability were "obviously `relat[ed] to rates,' " and therefore, within the scope of the statute. In its discussion, the Court recognized that " `some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner, 'to have preemptive effect." Id. at 2040 (citations omitted). For example, this Court recognized that state laws unrelated to pricing or rates were not preempted. Furthermore, while

recognizing that the prohibitions might arguably fall within the scope of "services", they were nonetheless too remotely related to be preempted by statute.

In the instant matter, the same reasoning should be applied. Suits grounded in common law theories of tort and contract do not directly affect the airlines' ability to conduct their daily business. The issue before this Court is whether it is acceptable to obliterate the rights of an individual from harm caused by unreasonably negligent behavior engaged in by an airline, when such behavior would render the average person liable for those same or similar actions. It is Petitioner's understanding of Morales that state common law causes of action are not preempted by the statute since they are within that category of laws that too tenuously or remotely affect airline rates, routes or services.

Despite Morales, several state and Circuit Courts of Appeals have rendered conflicting decisions regarding which, if any, state claims are to be preempted. However, the majority of the courts reason that the preemptive scope of the statute is not so pervasive as to prohibit suits brought under state common law theories of tort and contract. Petitioner now seeks a ruling from this Court, stating what the law is regarding the preemptive effect of § 1305. The Court's decision, in this instance, is necessary given the number of cases that have arisen, stemming from similar, if not identical claims, from those set forth in Petitioner's complaint. Each of the following cases have resulted in conflicting decisions. The Petitioner will now discuss them, in turn, in the order in which they were rendered, following Morales.

In Vail v. Pan Am Corp., 260 N.J. Super 292, 616 A.2d 523 (App. Div. 1992) plaintiffs alleged that the defendants falsely advertised that they were implementing an enhanced security system. Accordingly, the plaintiffs were charged an additional five dollar fee on each ticket purchased, in order to defray the costs of the security system. According to the plaintiffs, no such program

was provided. Suit was commenced alleging willful misrepresentation, consumer fraud, and deceptive business practices. Id. at 524. The New Jersey Superior Court, Law Division, granted summary judgment in favor of the defendants. The Appellate Division affirmed, reasoning that the "plaintiffs' claims relate to an air carrier's rates and services," and were therefore preempted by § 1305. Id.

The Appellate Court in Vail distinguished the facts therein from its prior holding in Miller v. Northwest Airlines, 253 N.J. Super 618, 602 A.2d 785 (App. Div. 1992), where the court held that the plaintiff's state law tort claims of false arrest, and, negligent and intentional infliction of emotional distress were not preempted by § 1305. The Vail court further distinguished the claims in the respective cases, stating that the Vail claims "challeng[ed] the `service' itself," Vail, 616 A.2d at 527, while the Miller claims "arose out of a single incident tangentially related to the `service' of an airline." Id. Therefore, under Vail's, and its predecessor, Miller's, interpretation of § 1305, state law claims, like those alleged by Petitioner, are not preempted by § 1305.

In Lawal v. British Airways, 812 F.Supp. 713 (S.D.Tex. (Houston Div.) 1992), plaintiff had purchased an airline ticket from the defendants, to Nigeria. When he attempted to board a connecting flight in London, he was accused, by British Airways security, of using a stolen ticket, and was required to purchase another round trip ticket in order to complete his travels. Upon returning to Houston, plaintiff demanded compensation from the defendant; the request was denied. Plaintiff then filed suit alleging false arrest and false imprisonment, assault and battery, and intentional infliction of emotional distress. The Lawal court, reached a different conclusion than Vail.

Insofar as the intentional and negligent infliction of emotion distress and false arrest claims were concerned, the court concluded that the claims were not "tenuous or remote and clearly

related[ed] to airline services." Lawal, 812 F.Supp. at 720.

Later, the Houston Division rendered a decision in Butcher v. Houston, 813 F.Supp. 515 (S.D.Tex. 1993), which permitted a plaintiff to maintain his action against the City of Houston and Southwest Airlines, for negligence and gross negligence arising from a slip and fall at the airport gate. The court reasoned that the statute refers to those "services" which "necessarily pertain to distinctive airline services." Butcher, 813 F.Supp. at 517. Citing Morales, the court reiterated the rationale underlying the preemption provision, specifically, "The purpose of this legislation,... was to preclude states from attempting to regulate rates, routes, and services, thereby leading to a confusing and burdensome maze of state laws and regulation peculiarly affecting the airlines. ... Congress wanted to prevent conflicts and inconsistent regulations." Id. (citations omitted). The court further stated that such common law duties, such as the duty to exercise reasonable care in the maintenance of floors, was "not the sort of state law or regulation that would `confuse or unduly burden' either the airline or the airline passengers." Butcher, 813 F. Supp. at 518. The court set forth some examples of state regulations that would affect rates and services, and thereby cause confusion to the airlines regarding individual state's laws. Regulations setting frequency of airline service to certain cities, requiring nonstop flights, or providing conditions for preferred seating, were undoubtedly "beyond the power of states to regulate or otherwise affect by local law." Butcher, 813 F. Supp. at 517-518.

The Petitioner's claims are far from the criteria that the Butcher court interpreted as those intended by Congress to be preempt under § 1305. The claims of this Petitioner are not the type the airline industry could assert they would be "confused or unduly burdened" by. The basic concepts of tort and contract law do not vary so greatly from state to state that the airlines will be burdened in attempting to ascertain what each state's laws require of the carriers on a state-by-state basis. The law makes no

exceptions for any individual regardless of which states he may traverse, or in which state he resides. If this does not place undue burden or confusion on the average person, then it does not do so to the airline industry. Most importantly, the apparent discrepancy between the Butcher and Lawal cases -- rendered by the same court -- warrants a decision by this Court, clarifying the scope of preemption regarding state common law claims, specifically.

The Ninth Circuit's decisions support Petitioner's position. In West v. Northwest Airlines, 995 F.2d 148 (9th Cir. 1993), the Court of Appeals reviewed its prior decision in the same matter, pursuant to this Court's remand for further consideration. In West, plaintiff purchased an airline ticket from Northwest. Due to overbooking, Northwest refused to allow plaintiff to board the plane. Plaintiff filed suit alleging breach of the covenant of good faith and fair dealing pursuant to Montana law, and discrimination pursuant to section 404(b) of the Federal Aviation Act (FAA), seeking compensatory and punitive damages. West, 995 F.2d at 149-50. The District Court granted summary judgment in favor of Northwest on the grounds that the plaintiff's claims were preempted by the FAA. West appealed the issue of whether the state law claims were preempted by the FAA, and the Court of Appeals affirmed in part and reversed in part, finding that the FAA preempted the claims for punitive, but not compensatory damages under state law. Id. at 150. The Court of Appeals distinguished "between state laws which `merely have an effect on airline services' and those involving an `underlying statute or regulation [which] itself relates to airline services.'" West, 995 F.2d at 151. Both parties petitioned this Court for certiorari; the Court postponed deciding the petitions until after it had rendered a decision in Morales. The Court then denied West's petition and granted Northwest's, and remanded the case to the Court of Appeals to pass on whether compensatory damages were preempted. Id.

The Court of Appeals again concluded that state contract

laws and tort laws, upon which West based his allegations, were not preempted by the Airline Deregulation Act (ADA) because they fell within the "range of statutes too tenuously connected to airline regulation to trigger preemption." West, 995 F.2d at 151. In addition, the Ninth Circuit noted that Morales lacked sufficient guidelines to enable courts in to decide which state laws sufficiently affected rates, routes and services to trigger preemption. Id.

In the instant matter, the most significant part of the West decision is that portion which discusses the standard used in deciding whether the ADA preempts state law claims. The Ninth Circuit looked to the agency regulations interpreting the FAA. Specifically, part 250.9 of Title 14 of the Code of Federal Regulations, which implements the Deregulation provision, allows passengers, who have been denied passage, due to oversales or overbooking, the option to refuse compensation from the airline and attempt recovery in a court of law. West, 995 F.2d at 152. The Ninth Circuit, in concluding that compensatory damages were not preempted by the statute stated: "Were we to hold that West's state claims are preempted completely by the ADA, we would eviscerate the third option detailed in the regulation. The plain language of the regulation indicates that passengers retain the option... of pursuing compensatory damages in the state court." Id.

In Hodges v. Delta Airlines, 4 F.3d 350 (5th Cir. 1993), the Circuit Court of Appeals, bound by an earlier opinion in Baugh v. Trans World Airlines, 915 F.2d 693 (5th Cir. 1990), reluctantly preempted a negligence action pursuant to § 1305. In Hodges, plaintiff brought an action against the airline, alleging negligence in allowing a case of rum to be stored in an overhead compartment, which fell, struck and injured him. The District Court granted summary judgment in favor of the defendant. The Court of Appeals affirmed. The Fifth Circuit, while following Baugh, urged an *en banc* review of the decision. Hodges, 4 F.3d at 352. *En banc* review was granted January 12, 1994, 1994 WL

6232. Although the *en banc* decision has not yet been rendered, it is clear that the Fifth Circuit does not construe § 1305 so broadly as to preempt common law tort causes of action due to their remote effect on an airline's rates, routes, or services.

The Hodges discussion centered primarily on the legislative history of the ADA, which was intended to be an economic deregulation statute. Hodges, 4 F.3d at 353. In 1978, Congress amended the FAA "after determining the efficiency, innovation, low prices, variety, and quality would best be furthered by reliance on competitive market forces in the airline industry." Id. The ADA was enacted to dismantle the then-existing federal regulation of the industry. Section 1305 paralleled the federal deregulation at the state level. Id.

The court concluded that Congress did not intend to preempt state law tort claims. In support of this proposition, the court looked to § 1506 of the FAA which preserved remedies existing at common law or by statute. Hodges, 4 F.3d at 355. The court recognized that § 1305 limited the saving power of § 1506, but nevertheless concluded that "since Congress left that section intact," it could not have intended to "completely undermine the savings clause." Id.

The Fifth Circuit exemplifies the confusion caused by § 1305, not only among the Circuits, but within them as well.

Approaching the preemption issue in the same manner as the Fifth Circuit Court of Appeals had, the District Court for the District of Massachusetts also looked to Congressional intent. It decided that claims for intentional infliction of emotional distress and assault and battery, arising from an apparently racially motivated altercation between a flight attendant and the plaintiff, while he was stowing his baggage and seating himself, were not preempted. Doricent v. American Airlines, 1993 WL 437670 (D. Mass.). The District Court found that the state law claims did not

meet the "sufficient impact" test, as set forth in Morales. Specifically, the state law claims asserted did not significantly "relate to" rates, routes, or services, to necessitate preemption under the statute. Id. at 4. The District Court concluded that the claims alleged therein had nothing to do with the Congressional intent underlying the act, to wit, the "industry-wide practice of affording airline service." Id. at 5.

Another District Court within the Fifth Circuit also concluded that common law claims for false imprisonment and slander were not preempted by the statute. Fenn v. American Airlines, 839 F. Supp. 1218 (S.D. Miss. 1993). In Fenn, the plaintiff was accused of stealing another passenger's ring while providing medical assistance to the passenger. The plaintiff was then detained by the airline officials and publicly accused of taking the ring. In reaching its conclusion, the District Court went through the usual steps of ascertaining Congressional intent and interpreting the Morales decision. The court did, however, question the Hodges result, stating that claims for bodily injury could fall within the ambit of "services" insofar as services require an airline to provide to its passengers, safe transportation. Therefore, any claims that arose due to the airline's failure to provide safe passage, fell within the scope of the statute. Fenn, supra 839 F.Supp. at 1223. Presumably, the Fenn court would preempt such claims. Nevertheless, it did find that the airline's detention of an alleged thief was "by no means an airline `service'". Fenn, 839 F.Supp. at 1223. This case serves as another example of the need for a decision from this Court as to what common law causes of action are not preempted by the statute. If this Court agrees with Fenn, that the detention of an alleged thief, by an airline, is not within the meaning of "services", then clearly, Petitioner's claim for malicious prosecution and false arrest are not preempted.

In direct support of Petitioner's position, that a breach of contract claim is not preempted by the statute, is Wolens v.

American Airlines, 626 N.E.2d 205 (1993). In Wolens, the Plaintiffs filed a class action suit on behalf of the participants in American's frequent flyer program. American changed the program's rules and applied the changes retroactively. Suit was filed alleging breach of contract, and violations of the Illinios Consumer Fraud and Deceptive Business Practices Act, seeking inter alia, injunctive relief enjoining American from implementing the changes. The Appellate Court granted interlocutory review on the issue of whether the injunctive relief sought would constitute "an attempt to regulate the airline," and concluded that it would. Wolens, 626 N.E.2d 206. The Illinios Supreme Court affirmed. American petitioned for certiorari. This Court granted certiorari, vacated the Illinios Supreme Court's decision and remanded for further consideration in light of Morales. The Illinios Court thereafter found its prior ruling, on the issue of injunctive relief, consistent with Morales.

In reviewing the claims for money damages, stemming from the breach of contract claim and the state Consumer Fraud Act violations, the Illinios Court concluded that the claims were not preempted by the statute, or by this Court's ruling in Morales. Specifically, the Illinios Court found that Morales "intended to leave open the possibility that state law actions that had only a slight connection to an airline's rates, routes, or services, would not be preempted." Wolens, 626 N.E.2d at 208. The frequent flyer program was not an "essential element" of airline operations and therefore, the claims bore only a "tangential relation" to rates, routes, and services. Id. Should this Court agree with Wolens interpretation of both the statute and Morales, as they pertain to breach of contract claims, then the Petitioner's breach of contract claim, in the instant matter, was wrongfully dismissed.

The most recent case involving this issue dealt with claims substantially similar to the Petitioner's claims herein. In Bayne v. Adventure Tours USA, 1994 WL 9531 (N.D. Tex. Jan 13, 1994), the plaintiff was taken into custody, detained and subjected to a

luggage search after the pilot made misrepresentations about the plaintiff to the police. The complaint alleged violations of the Texas Deceptive Trade Practices Act, breach of warranty, slander, severe emotional distress, and false imprisonment. Relying heavily on dicta in Hodges, and the Fifth Circuit's obvious intent to review its own decision due to binding precedent, the Bayne court concluded that the plaintiff's claims were not preempted by § 1305. Further, the court expressly declined to follow precedent interpreting § 1305 broadly, namely, Lawal, *supra*. Id. at 2. Ultimtely, the court found that it lacked subject matter jurisdiction over the state law claims, and remanded the matter to the state court for adjudication.

It is apparent since this Court's decision in Morales that the majority of the Circuit and state courts have interpreted the preemption provision narrowly. All the cases cited above involved claims similar, if not identical, to those alleged by the Petitioner, and none were held to be preempted pursuant to the statute. *See*, Miller, *supra* (false arrest); Fenn, *supra* (false imprisonment); Wolens, *supra* (breach of contract). Therefore, should this Court agree with the decisions rendered by those courts, then the Petitioner's complaint should be reinstated.

Nevertheless, Petitioner does not deny that some confusion still exists among the lower courts as to which state causes of action should be preempted, if any. *See*, Vail, *supra* (fraud and breach of contract); Lawal, *supra* (intentional infliction of emotional distress, false arrest and imprisonment); Hodges, *supra* (common law negligence claim). This disparity among the courts renders this issue proper for certification before this Court. As it now stands, the statute does little to alleviate confusion or undue burdens on the airline industry regarding the various states' laws. The confusion causes increased litigation and haphazard results. *See*, Butcher discussion, *supra*. From the plaintiff's perspective, the law either preserves those minimal rights available at common law, or, in effect, allows the airline to unreasonably inflict injury

upon the passengers, without providing any recourse.

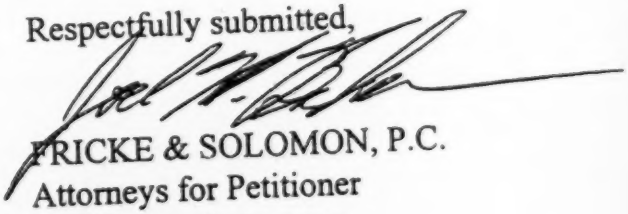
Therefore, Petitioner respectfully requests that this Court grant certiorari to render a final determination as to which common law causes of action remain viable, in light of § 1305. The decision will assist the airline industry by setting forth those state law claims to which it remains subject. Regardless of the effect this Court's decision may have on Petitioner's claims, the matter presents the Court with the opportunity to address this issue, and state once and for all what the meaning of § 1305 is.

CONCLUSION

It is clear that there are conflicting decisions that have been rendered by various circuit courts, federal district courts and state courts since this Court's decision in Morales v. Transworld Airlines, Inc., in particular, with regard to which, if any, common law causes of action by individuals are preempted by the Airline Deregulation Act. The resolution of this conflict is crucial since instead of clarifying congressional intent, confusion has resulted. For these reasons, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the District Court of New Jersey and Court of Appeals for the Third Circuit.

Dated: September 30, 1994

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-5042

JOHN FRESSIE
Appellant

v.

TRANS WORLD AIRLINES;
DIANA MAGADAN, Individually

On Appeal from the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 89-01910)
District Judge: Honorable Maryanne Trump Barry

Argued: June 20, 1994

BEFORE: STAPLETON, GARTH and PRATT,* Circuit Judges

JUDGMENT ORDER

---

* Honorable George C. Pratt, United States Circuit Judge for the Second Circuit, sitting by designation.

After consideration of the contentions raised by appellant,** it is

ORDERED AND ADJUDGED that the judgment of the district court entered December 26, 1991, be and the same is hereby affirmed.

Costs taxed against appellant.

By the Court,

_____

Circuit Judge Walter K. Stapleton

ATTEST:

_____

P. Douglas Sisk, Clerk

Dated: July 6, 1994

** While we agree with appellant that the district court erred in dismissing his breach of contract claim for lack of subject matter jurisdiction, we conclude that this claim, like appellant's other claims, is preempted by federal law.

APPENDIX-B

UNITED STATES DISTRICT COURT
District of New Jersey

Chambers of
MARYANNE TRUMP BARRY

USPO & Courthouse Bldg.
Newark, NJ 07101

December 23, 1991

LETTER OPINION
ORIGINAL FILED WITH THE CLERK OF THE COURT

Mr. Richard M. Fricke, Esq.
Daniels & Solomon, P.A.
60 Westervelt Avenue
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ORIGINAL FILED
December 23, 1991
William T. Walsh, Clerk

Mr. John D. Clemen, Esq.
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Re: John Fressie v. Trans World Airlines and Diana Magadan, Individually,
Civil Action No.: 89-1910(MTB)

Dear Counsel:

I. INTRODUCTION

Presently before the court is defendant Trans World Airlines' (TWA) motion for summary judgment. TWA contends that plaintiff John Fressie's three state law causes of action must be

dismissed on the ground that federal legislation has preempted such actions against air carriers or, in the alternative, that TWA had a duty to remove an allegedly obstreperous passenger from an aircraft and, thus, that there is no basis for tort liability. Finally, TWA argues that if this court is not inclined to rule in its favor on either of those two contentions, the court should, at a minimum, limit plaintiff's potential recovery to ten dollars because of his failure to mitigate damages. Plaintiff responds that federal law does not preempt his state law causes of action, that whether TWA had a right or duty to take the actions it did is properly a jury question, and that its liability should not be limited. For the reasons that follow, TWA's motion will be granted in part and the remainder of this action will be dismissed for lack of subject matter jurisdiction.

II. FACTUAL BACKGROUND

Because the instant motion is one for summary judgment, all reasonable factual inferences must be viewed in favor of plaintiff, the non-moving party. Matsushita Elec. Industrial Co. v.

Zenith Radio Corp., 475 U.S. 574, 587 (1986). This litigation arises out of a dispute between TWA and plaintiff John Fressie, one of its passengers. Plaintiff, a frequent domestic and international air traveler, planned a trip to France for October, 1988. He had sufficient frequent flier miles with TWA to request an award of a round trip first class ticket to France. Deposition of Susan Boyd, Pl. Opp. Br., Exh. J (hereinafter "Boyd Dep.") at 27; Deposition of Gayle Snow, Pl. Opp. Br., Exh. G (hereinafter "Snow Dep.") at 13. When plaintiff's secretary attempted to make reservations for first class seating for him on TWA Flight 800, departing on October 15, 1988 from John F. Kennedy Airport, New York to Charles DeGaulle Airport, Paris, France, TWA informed her that there was no first class seating available on the flight. Instead, it confirmed a seat reservation in Ambassador Class, noting that plaintiff could check back at a later date to see if first class seating became available. Snow Dept. at 14.

TWA sent plaintiff a frequent flier bonus coupon entitling him to one first class round trip ticket. Pl. Opp. Br., Exh. C;

Deposition of John Fressie, Def. Movant Br., Exh. C (hereinafter "Def. Fressie Dep.") at 106. On October 6, 1988, plaintiff went to the TWA counter at O'Hare Airport in Chicago in order to secure a First Class seat reservation for his upcoming flight to France. Deposition of John Fressie, Pl. Opp. Br., Exh. E (hereinafter "Pl. Fressie Dep.") at 73. When plaintiff was informed that he could not receive a confirmed First Class ticket due to unavailability of seating for that class of ticket, he apparently became angry and caused a scene. Deposition of Daniel Sullivan, Pl. Opp. Br., Exh. H (hereinafter "Sullivan Dep.") at 39. The TWA ticket agent then issued a First Class boarding pass against a separate First Class reservation that plaintiff had made in order to circumvent the nonavailability in the frequent flier class. Sullivan Dep. at 42.

On October 15, 1988, plaintiff boarded TWA Flight 800 and sat in the First Class section of the aircraft. When another passenger indicated to plaintiff that plaintiff was seated in his seat, plaintiff instructed the other passenger to "[g]et the flight attendant." Def. Fressie Dep. at 96. Plaintiff moved over one seat;

then, when asked to move to the Ambassador Class section of the aircraft, plaintiff refused to move. Def. Fressie Dep. at 96, 99; Pl. Fressie Dep. at 103. When a flight attendant indicated that if plaintiff did not move he would be arrested, plaintiff continued to refuse to move. Pl. Fressie Dep. at 104. Finally, plaintiff was escorted off the plane by Port Authority Police. Pl. Fressie Dep. at 104. Although TWA offered to book plaintiff on a flight later that evening on Pakistani Airlines, he refused the offer, electing instead to purchase a Business or Coach Class ticket on TWA flight 800 for the following day. Pl. Fressie Dep. at 111-12.

TWA employee (and codefendant) Diana Magadan signed a complaint, and a summons citing plaintiff for disorderly conduct was issued. Criminal Complaint, Pl. Opp. Br. Exh. A. The charge was later dropped for failure to prosecute.[1]

Plaintiff alleges three state law claims against TWA and Diana Magadan -- false arrest and malicious prosecution (Count I), breach of contract (Count II), and a separate claim for punitive

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1 Thus, a claim for malicious prosecution will not lie.

damages (Count III).

III. Analysis

A. Federal Preemption of Plaintiff's State Law Claims

TWA contends that plaintiff's state law claims against it are preempted by federal law, specifically the Federal Aviation Act, as modified by the Airline Deregulation Act, 49 U.S.C. § 1301 et seq.

Generally, federal law can preempt state law in one of three different ways. Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board, 467 U.S. 461, 469 (1984). First, Congress may expressly define the extent to which a federal law will preempt state law. See, e.g., Shaw v. Delta Airlines, Inc., 463 U.S. 85, 95-96 (1983). Second, where Congress indicates an intent to occupy an entire field of regulation, federal law will be deemed to preempt state law. See, e.g., Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153(1982). Third, where state law and federal law conflict, the federal law will be deemed to preempt state law. See, e.g., Florida Lime & Avacado Growers v. Paul, 373 U.S. 132, 142-43 (1963).

In support of its preemption argument, TWA relies primarily on O'Carroll v. American Airlines, 863 F.2d 11 (5th Cir.), cert. denied, 109 S. Ct. 3158 (1989). O'Carroll involved a suit by a passenger against an air carrier for removing the passenger from a flight. Plaintiff was drunk when he boarded the flight and was generally boisterous. After discovering an irregularity with plaintiff's ticket, the flight attendant asked him to deplane to straighten out the problem. When plaintiff refused to leave the plane, the police came and arrested him for disorderly conduct. The Fifth Circuit held that plaintiff's state law claims of wrongful exclusion were preempted by federal law. The O'Carroll court cited the broad discretion granted to air carriers by section 1511 of the Federal Aviation Act as to whom will be granted or denied passage. That section provides in pertinent part:

> Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

49 U.S.C. § 1511(a). See Williams v. Trans World Airlines, 509

F.2d 942, 949 (2d Cir. 1975) (denying plaintiff's damages claims because defendant airline acted in accordance with section 1511 in denying plaintiff passage to protect the safety of other passengers). The court then noted that this discretion is not absolute, but is limited by 49 U.S.C. § 1374. In particular, the court indicated that an implied private cause of action exists under section 1374. O'Carroll, 863 F.2d at 13.

As plaintiff correctly points out, section 1374 has been, for the most part, repealed by the sunset provisions of the Airline Deregulation Act of 1978, Pub. L. No. 95-405, 92 Stat. 1744 (codified at 49 U.S.C. § 1551(a)(2)(B) and (4)(C)). Therefore, while it may have once been true that a private right of action existed under section 1374, it is clear that no such right now exists.[2]

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2 Section 1551(a)(2)(B), effective January 1, 1983, repealed section 1374 to the extent that it related to the interstate and overseas air transportation of persons. See 49 U.S.C. § 1551(a)(2). Effective January 1, 1985, section 1551(a)(4)(C) repealed section 1374 more generally to the extent it related to interstate and overseas air transportation. See 49 U.S.C. § 1551(a)(4)(C).

However, the explicit language of each of these subsections of section 1551 makes clear that they repealed section 1374 except as it requires air carriers to provide safe and adequate service. See 49 U.S.C. § 1551(a)(2)(B) and (4)(C) (specifically stating that the

Nevertheless, the existence of a private cause of action under federal law was not dispositive in O'Carroll and the question of preemption must be analyzed independently of whether such a private cause of action exists. See Illinois Corporate Travel, Inc. v.

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provisions would cease to be in effect "except in so far as such section requires air carriers to provide safe and adequate service"). Of the two subparts of section 1374, only section 1374(a) requires air carriers to provide safe and adequate service. See 49 U.S.C. § 1374(a) ("It shall be the duty of every air carrier . . . to provide safe and adequate service . . .). Therefore, no portion of section 1374(b), which prohibited air carriers from unduly, unjustly, or unreasonably discriminating against "any particular person, port, locality, or description of traffic," survived section 1551. Rather, only that portion of section 1374(a) dealing with safe and adequate service was saved by the language in section 1551.

As the case law indicates, the private cause of action implied under section 1374 could only have been under section 1374(b). See Anderson v. USAir, Inc., 818 F.2d 49, 54-55 (D.C. Cir. 1987) (applying the four prong test of Cort v. Ash, 422 U.S. 66, 78 (1975) and concluding that section 404(a) of the Aviation Act, 49 U.S.C. § 1374(a), does not create a private remedy); Hingson v. Pacific Southwest Airlines, 743 F.2d 1408, 1414 (9th Cir. 1984) (no private right of action under section 1374(a)); Diefenthal v. C.A.B. 681 F.2d 1039, 1049-50 (5th Cir. 1982), cert. denied, 459 U.S. 1107 (1983) (recognizing that a private cause of action may exist under section 1374(b), but declining to imply one under section 1374(a)). Therefore, because a private cause of action could only be implied under section 1374(b) and the language of section 1551 repealing section 1374 carves out only one exception that is not relevant to section 1374(b), there can no longer be a private cause of action under section 1374.

American Airlines, Inc., 889 F.2d 751, 754 (7th Cir. 1989).

Section 105 of the Federal Aviation Act, 49 U.S.C. § 1305, is an express preemption provision:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

The question before the court is whether plaintiff's claim of false arrest, breach of contract, and punitive damages "relate to" services of the air carrier within the meaning of section 1305. If they do, then the express preemption provision of section 1305 demands dismissal.

1. False Arrest and Malicious Prosecution

Clearly, the great weight of authority on this point indicates that the conduct at issue here, i.e. the removal of an obstreperous passenger by the Port Authority Police, is within the meaning of "services" as used in section 1305. See Anderson v.

USAir, Inc., 818 F.2d 49, 57 (D.C. Cir. 1987) (state law obligation to give courteous service was related to services and therefore preempted); O'Carroll, 863 F.2d at 13 (removal of unruly passenger related to services); Hingson v. Pacific Southwest Airlines, 743 F.2d 1408, 1415 (9th Cir. 1984) (California state law requiring equal access for blind persons related to services and therefore preempted); Gay v. Carlson, 1991 WL 190584 (S.D.N.Y. September 17, 1991) ("A state law remedy for a passenger who felt wrongly excluded from a particular flight would contravene the express intent of Congress to ensure that such decisions are governed by federal standards"); VonAnhalt v. Delta Air Lines, Inc., 735 F. Supp. 1030, 1031 (S.D. Fla. 1990) (plaintiff's state tort claims arising from her removal from an airplane related to services and preempted). Because the "services" at issue here fall within the ambit of section 1305, the statute's plan language preempts any state law relating to them.

The Ninth Circuit, while concluding that "services" must be read to include boarding policies, has cautioned that section 1305

should not be read too expansively. West v. Northwest Airlines, Inc., 923 F.2d 657, 660 (9th Cir. 1990). Citing the presumption against preemption in traditional state law areas, the court opined that state law which merely affect airline services should not be preempted. Id. West holds that state law should be preempted only when the underlying statute or regulation itself relates to airlines. Id. Under the West formulation, plaintiff's state law claims would not be preempted.

I find West's interpretation of section 1305 too narrow.[3]

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3 For several reasons, I am similarly unpersuaded by plaintiff's reliance on Salley v. Trans World Airlines, Inc., 723 F. Supp. 1164, 1166 (E.D. La. 1989). First, the court in Salley stated that plaintiff's state law claims were not preempted because they did not conflict with any provision of the Federal Aviation Act. Id. That court treated the preemption issue as one arising from a conflict between state and federal law. Of the three ways in which federal preemption may occur, section 1305, entitled "Federal Preemption," is quite clearly express preemption. Indeed, it is difficult to imagine a more express preemption. Thus, it is immaterial whether the state law conflicts with a federal provision. See Illinois Corporate Travel, Inc. v. American Airlines, Inc. 889 F.2d 751, 754 (7th Cir. 1989) (where federal preemption is express, the absence of contrary federal law is irrelevant). Second, in Salley the airline did not act in the name of safety, as in O'Carroll. Salley, 723 F. Supp. at 1166. Here, TWA has asserted that it removed plaintiff because he posed a potential threat to the safety of other passengers. The facts here are much closer to those in O'Carroll

Congress' intent to preempt state law relating to airline services is patently clear.[4] Furthermore, section 1511 specifically leaves the decision as to whether or not to exclude a passenger from a flight based on safety considerations to the air carrier. 49 U.S.C. § 1511(a). Here, TWA made a decision to remove plaintiff from the aircraft based on safety considerations, a decision contemplated by section 1511 and, as such, not subject to scrutiny under state law standards. See Stewart v. American Airlines, Inc., 1991 WL 226391, *4 (S.D. Tex. October 29, 1991) (state law preempted where it creates a different standard than the Federal Aviation Act). Plaintiff's remedy, if any, must come from federal law.

2. Punitive Damages

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than those in Salley.

4 Case law interprets the statutory language "relating to" broadly. See Illinois Corporate Travel, Inc. v. American Airlines, Inc., 889 F.2d 751, 754 (7th Cir. 1989) ("relating to" language substantially increases the extent of preemption); see also Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) (interpreting "relating to" language in the context of ERISA preemption as expanding the scope of preemption).

Because plaintiff's tort claim for false arrest must be dismissed under the preemption doctrine, plaintiff's claim for punitive damages must also be dismissed. Punitive damages cannot be awarded in connection with a breach of contract claim. See W.A. Wright, Inc. v. KDI Sylvan Pools, Inc., 746 F.2d 215, 217-18 (3rd Cir. 1984); Ellmex Constr. Co. v. Republic Ins. Co., 202 N.J. Super. 195, 207 (App. Div. 1985).

3. Breach of Contract

Having dismissed plaintiff's tort claims and punitive damages claim, this court is divested of jurisdiction over the breach of contract claim, the only remaining claim. Plaintiff initially brought suit in state court. TWA subsequently removed the action to this court on the basis of both federal question and diversity jurisdiction. Notice of Removal .¶7. The action was properly removable on diversity grounds, inasmuch as plaintiff is a New Jersey resident and TWA and Magadan are both citizens of New York. See 28 U.S.C. § 1441(b). Removal on the ground that this court had original jurisdiction over the action based on a federal

question, however, was improper.

Whether or not federal question jurisdiction exists is governed by the "well-pleaded complaint" rule--that "a cause of action arises under federal law only when the plaintiff's well pleaded complaint raises issues of federal law." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). Plaintiff's complaint does not raise any federal question on its face, but rather asserts only state causes of action. In its notice of removal, TWA asserts that federal question jurisdiction exists as a result of preemption. Notice of Removal ¶4. Although the analysis, supra, concludes that plaintiff's state tort claims are, in fact, preempted by federal law, this preemption should not be confused with "complete preemption." Only such "compete preemption" enables a federal court to assert original jurisdiction.

Complete preemption is a very narrow exception to the well-pleaded complaint rule. Federal preemption is ordinarily a defense to a plaintiff's claims. Metropolitan Life Ins., 481 U.S. at 63. However, where Congress has so completely preempted an

area that any complaint raising claims in that area must necessarily be federal in character, federal jurisdiction will lie. Id.; Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 23 (1983) (the preemptive force of section 301 of the Labor Management Relations Act (LMRA) is so potent that even a breach of contract action will be deemed federal in nature). Initially the doctrine was limited in application to the LMRA. See Avco Corp. v. Machinists, 390 U.S. 557 (1968). The Supreme Court later extended complete preemption to certain state law claims coming within the bounds of ERISA. See Metropolitan Life Ins., 481 U.S. at 66.

There is no indication in the case law that the FAA so completely preempts state law that a state law breach of contract action is transformed into a federal question. On the contrary, breach of contract claims arising out of air carriage contracts have been treated under state law. See e.g., Anderson, 818 F.2d at 57 (considering breach of contract claim without mention of federal preemption); Diefenthal, 681 F.2d at 1051 (dismissing plaintiff's

breach of contract of air carriage claims because amount in controversy for diversity jurisdiction not met); Kutner v. Eastern Airlines, Inc., 514 F. Supp. 553, 557 (E.D. Pa. 1981) (rejecting plaintiffs' federal claims and holding that plaintiffs' tort and contract claims remain as a result of diversity of citizenship and are governed by Pennsylvania law); Clemente v. Philippine Airlines, 614 F. Supp. 1196, 1197 (S.D.N.Y. 1985) (breach of air carriage contract removed to federal court only under 28 U.S.C. § 1441(d) as a civil action brought against a foreign state). Therefore, this court's continuing jurisdiction over this action must come, if at all, from diversity of citizenship.

In addition to complete diversity between plaintiffs and defendants, diversity jurisdiction requires that the amount in controversy exceed $50,000. 28 U.S.C. § 1332(a).[5] Without

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5 The amount in controversy requirement of 28 U.S.C. § 1332 was increased from $10,000 to $50,000, effective for all civil actions commenced on or after November 19, 1988. This case was filed in New Jersey state court on March 29, 1989 and was removed to this court on May 1, 1989. Therefore, the $50,000 amount in controversy requirement is applicable to this action.

plaintiff's state law tort claims and punitive damages claim, the amount in controversy falls far short of the statutory requirement. Plaintiff only alleges $10,000 in damages relating to the breach of contract claim. Complaint, Second Count ¶3. Therefore, this court no longer has subject matter jurisdiction over this action and, more specifically, over plaintiff's breach of contract claim.

IV. CONCLUSION

For the reasons set forth above, summary judgment will be granted in favor of defendants TWA and Diana Magadan on plaintiff's claims of false arrest and malicious prosection (Count I) and on plaintiff's punitive damages claim (Count III). As this court lacks subject matter jurisdiction over the remaining breach of contract claim (Count II), that count will be dismissed as to both defendants.

An appropriate order shall issue.

MARYANNE TRUMP BARRY
U.S.D.J.

Dated: December 23, 1991

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APPENDIX-C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ORIGINAL FILED
December 2, 1991
William T. Walsh, Clerk

JOHN FRESSIE,

Plaintiff,

Civil Action No.
89-1910(MTB)

VS.

TRANS WORLD AIRLINES and
DIANA MAGADAN, individually,

ORDER

Defendants.

This matter having been opened to the Court upon the motion of defendant Trans World Airlines for summary judgment pursuant to Fed. R. Civ. P. 56; and the Court having reviewed the submissions of the parties both in support of and in opposition to the motion without oral argument pursuant to Fed. R. Civ. P. 78;

It is on this 23rd day of December, 1991, for the reasons set forth in this Court's letter opinion of even date,

ORDERED, that the motion of defendant Trans World Airlines for summary judgment is hereby granted in part as to both defendants and the remainder of this action is dismissed as to both defendants for lack of subject matter jurisdiction.

MARYANNE TRUMP BARRY
U.S.D.J.

Supreme Court, U.S.
FILED
NOV 18 1994
OFFICE OF THE CLERK

No. 94-712

IN THE

Supreme Court of the United States

October Term, 1994

JOHN FRESSIE,

Petitioner,

v.

TRANS WORLD AIRLINES, DIANA MAGADAN, Individually,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Respondent Trans World Airlines ("TWA") accepts petitioner's Question Presented for Review, List of Parties, and Statutory Provisions for purposes of the Brief in Opposition.[1]

TWA accepts the Statement of the Case as provided by petitioner, except that TWA denies that it arrested and prosecuted petitioner. Rather, the Port Authority police issued a summons to petitioner charging violation of the New York Penal Code as a disorderly person engaged in tumultuous behavior. TWA employee, Diana Magadan, signed the Complaint Information as a witness. (P.A. B-5).[2] The criminal complaint was subsequently dismissed by the court due to the State of New York's repeated requests for adjournments, despite Ms. Magadan's appearance in court to testify. (R.A. A1 to A4).

In addition, petitioner has failed to include the undisputed facts from which petitioner's claims arose. This factual background, in a light most favorable to petitioner, is provided in the decision of the United States District Court for the District of New Jersey, attached as Appendix B to petitioner's Petition for Writ of Certiorari. A summary of the facts demonstrates that petitioner's claims arose out of TWA's ticketing, boarding and seating services, claims which all courts agree are preempted.

Petitioner attempted to cash in a frequent flyer bonus certificate for a first class seat on TWA's October 15, 1988 Flight 800 from John F. Kennedy Airport in New York, New York to Charles DeGaulle Airport in Paris, France. (P.A. B-2 to B-4). No frequent flyer first class seats were available. (P.A. B-2 to B-4). In order to circumvent the non-availability of a frequent flyer first class seat assignment, prior to the date of flight, petitioner, after creating a scene at Chicago's O'Hare Airport, reserved a full fare

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[1] Pursuant to R. 29.1 Respondent Trans World Airlines has no parent corporations or subsidiary corporations.

[2] References to Petitioner's Appendix will be cited as "P.A. ___." References to Respondent's Appendix, attached, will be cited as "R.A. ___."

first class seat and obtained a boarding pass. (P.A. B-4). Petitioner did not, however, pay the full fare and his reservation was automatically canceled at the expiration of the time for payment.

On October 15, 1988, petitioner boarded Flight 800 and occupied a seat in the first class section of the aircraft. (P.A. B-4). A dispute arose with respect to the validity of petitioner's first class seat assignment, and TWA requested that he move to the Ambassador Class section of the aircraft. (P.A. B-4 to B-5). Petitioner repeatedly refused to change his seat. (P.A. B-4 to B-5). He created a disturbance and subsequently left the aircraft, escorted by the Port Authority police. (P.A. B-5).

After having refused to accept a seat in the Ambassador Class section, TWA offered to obtain for petitioner a seat on Pakistani Airlines for later that night. (P.A. B-5). Petitioner, however, was not interested, and he ultimately departed for France on TWA Flight 800 on the following day. (P.A. B-5)

Accordingly, this entire case arises out of petitioner's fraudulent attempt to circumvent TWA's frequent flyer system and his belligerent refusal to accept a seat assignment in the Ambassador Class section of the aircraft in accordance with TWA's ticketing, boarding and seating practices.

SUMMARY OF ARGUMENT

Review on Writ of Certiorari is not a matter of right, but of judicial discretion. *Sup. Ct. R.* 10. In this matter, petitioner contends that his Petition should be granted because of conflicts among the courts concerning the meaning of provisions of federal law, specifically the preemption provision of the Federal Aviation Act, 49 *U.S.C.A.* § 1305. However, a review of the case law cited by petitioner reveals that there is no conflict with respect to the application of § 1305 to petitioner's claims which arose out of TWA's ticketing, boarding and seating services. Indeed, as

demonstrated herein, all courts agree that a passenger's claims arising out of these services, including the removal of a belligerent passenger, are preempted.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY AFFIRMED SUMMARY JUDGMENT IN CONFORMITY WITH THE APPLICABLE DECISIONS OF THIS COURT AND OTHER CIRCUIT AND STATE COURTS AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Prior to this Court's decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. _____, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992), the courts held that a passenger's state law claims arising out of an air carrier's decision to exclude the passenger from the aircraft due to a question with respect to the validity of the passenger's ticket, the passenger's belligerent behavior or the passenger's refusal to comply with the carrier's seating policy are preempted by § 1305. *See, e.g., O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989) (Section 1305(a)(1) expressly preempts state common law claims by a passenger who was excluded from a flight after creating a disturbance on aircraft); *Anderson v. U.S. Air, Inc.*, 818 F.2d 49 (D.C. Cir. 1987) (Section 1305(a)(1) preempts state law claims by a blind passenger who was excluded from flight, arrested and detained after refusing to move from his assigned seat which was near an emergency exit); *Von Anhalt v. Delta Air Lines, Inc.*, 735 F. Supp. 1030 (S.D. Fla. 1990) (Section 1305(a)(1) preempts state common law tort claims by a passenger who was excluded from flight after refusing to stow away her carry-on baggage); *Hastalis v. State of Illinois Human Rights Commission*, 562 N.E.2d 1272 (Ill. App. Ct. 1990), *appeal denied*, 567 N.E.2d 332 (Ill. 1991) (Section 1305(a)(1) preempts blind passenger's discrimination claim under the Illinois Human Rights Act for refusing to allow the passenger to board after he

refused to fill out a passenger assistance form). Indeed, in *Gay v. Carlson*, 1991 WL 190584 *2 (S.D.N.Y. Sept. 17, 1991), the Southern District of New York noted:

> An airline is in the business of providing air service to passengers. The issues of to whom to provide that service, and whom to exclude from a flight, clearly are issues relating to services of an air carrier. 49 *U.S.C.A. App.* 1305(a). A state law remedy for a passenger who felt wrongly excluded from a particular flight would contravene the express intent of congress to ensure that such decisions are governed by federal standards.

In *Morales v. Trans World Airlines, Inc.*, this Court reiterated that § 1305 expressly preempts state actions "having a connection with or reference to airline 'rates, routes, or services.'" 504 U.S. _____, 112 S. Ct. 2031, 119 L. Ed. 2d 157, 167-68 (1992). Although the Court recognized that some state actions may be "too tenuous[ly]" related to rates, routes or services to be preempted, 119 L. Ed. 2d at 172, it did not even suggest that claims arising out of ticketing, boarding and seating services are not sufficiently related. Indeed, following *Morales*, the courts continued to hold preempted passengers' claims arising out of the carrier's decision to exclude the passenger from the aircraft due to questions with respect to the validity of the passenger's ticket, boarding pass or seat assignment, the passenger's belligerent behavior or the passenger's refusal to comply with the carrier's seating policy.

In *Cannava v. U.S. Air, Inc.*, Av. Lit. Rep. (Andrews) 18020 (D. Mass. Jan. 7, 1993), the plaintiff brought state law tort claims after the air carrier allegedly refused to honor his airline tickets, treated him rudely and threatened to call airport security. The plaintiff was required to purchase new tickets for the same flight. The plaintiff in *Cannava*, as the petitioner in the within matter, also claimed that his new tickets were for first class seating, however, when he boarded the aircraft he was informed that his tickets were for coach seating. He was required to sit in coach and unable to sit together with his family. The United States District Court for the District of Massachusetts initially denied

defendant's motion to dismiss based upon preemption. However, after *Morales*, the *Cannava* court reconsidered and granted defendant's motion.

In *Lawal v. British Airways, PLC*, 812 F. Supp. 713 (S.D. Tex. 1992), the plaintiff brought state law tort claims after he was allegedly detained and assaulted by defendant's security personnel who claimed that plaintiff was using a stolen ticket. The United States District Court for the Southern District of Texas, relying on *Morales*, held plaintiff's claims preempted by § 1305 (a)(1).

In *Williams v. Express Airlines I, Inc.*, 825 F. Supp. 831 (W.D. Tenn. 1993), *reconsidering*, Av. Lit. Rep. (Andrews) 13153 (W.D. Tenn. Jan. 2, 1991), the plaintiff brought state law tort claims after he was denied boarding as a result of the carrier's policy of prohibiting wheelchair users from flying on its aircraft. The United States District Court for the Western District of Tennessee held that a plaintiff's breach of contract and negligence claims related to the services of the air carrier and were expressly preempted by § 1305. Av. Lit. Rep. (Andrews) 13153. With respect to plaintiff's claim of false imprisonment, however, the court initially held that intentional tort claims were not preempted. *Id.* at 13156, n. 3. With this Court's decision in *Morales*, however, the Western District of Tennessee reconsidered the question and concluded that plaintiff's false imprisonment claim was clearly preempted. 825 F. Supp. 831.

In *Seligman v. Northwest Airlines, Inc.*, Av. Lit. Rep. (Andrews) 19706 (N.D. Cal. Jan. 27, 1994), the plaintiffs filed an action alleging discrimination based on disability, which included numerous state law claims. The plaintiffs, a married couple who each had Tourette's Syndrome -- a genetic disability with various symptoms, including involuntary physical movements and vocalizations, which may include grunts, barks, high pitched sounds and use of obscene language or profanities -- were initially denied boarding. They were ultimately permitted to board the aircraft, but were treated poorly because of their disability. The United States District Court for the Northern District of California held their state law claims preempted, concluding that

accommodation of handicapped passengers and the plaintiffs' state law claims for improper treatment during boarding and flight are related to airline services. The court distinguished the case from products liability cases and personal injury/wrongful death actions arising out of unsafe conditions on aircraft. *Id.* at 19710.

This is a distinction petitioner fails to recognize when he suggests that the case law is conflicting. Some courts have held that a passenger's personal injury claims arising out of unsafe conditions are not preempted. However, these same courts have recognized preemption of claims arising out of ticketing, boarding and seating services and the exclusion of belligerent passengers. For example, in *Butcher v. City of Houston*, 813 F. Supp. 515 (S.D. Tex. 1993), relied upon by petitioner, the plaintiff's personal injury claim arising out of an airport slip and fall was not preempted, however, the United States District Court for the Southern District of Texas recognized and distinguished, as preempted, claims, such as this petitioner's claim, which relate to the alleged denial or inadequate provision of services such as ticketing, boarding or seating practices. 813 F. Supp. at 517. Indeed, the Southern District of Texas cited with approval *O'Carroll*, *Anderson* and *Von Anhalt*, recognizing that claims involving "ticketing, boarding, seating, in-flight service, and the like," are preempted. *Id.* The court also stated that "the exclusion of a belligerent passenger from an airplane [is] therefore [one of the] established examples of the kinds of activities that do relate to . . . 'services'". *Id.*

In *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993), *reh'g en banc granted*, 12 F.3d 426 (5th Cir. 1994), also cited by petitioner, where the plaintiff claimed she was injured when a box fell from the overhead compartment, the Fifth Circuit reluctantly found preemption based upon binding precedent – *Baugh v. Trans World Airlines, Inc.*, No. 87-2611 (S.D. Tex. Oct. 26, 1989) (memorandum and order), *aff'd per curiam*, 915 F.2d 693 (5th Cir. 1990) (personal injury claim arising out of flight attendant's stomping on plaintiff's foot preempted) – but expressed disagreement with the cited authority. The Fifth Circuit, however, made clear that claims arising out of ticketing, boarding or seating

practices are and should be preempted. 4 F.3d at 356. Indeed, the Fifth Circuit concluded:

> In *O'Carroll*, we did not discuss the scope of section 1305 because the state law claims arising from the alleged wrongful exclusion undeniably related to the services provided by the airline. Enforcement of *O'Carroll's* state law claims would result in significant *de facto* regulation of the airlines' boarding practices and, moreover, would interfere with the implementation of federal regulations granting the airlines substantial discretion in this matter.

Id.

Petitioner in this case simply fails to recognize that his claim is distinguishable from the claims in *Butcher* and *Hodges*, and more akin to the claims in *O'Carroll*, *Anderson*, *Von Anhalt*, *Cannava*, *Lawal*, *Williams* and *Seligman*, all of which were preempted. Petitioner did not suffer a personal injury as a result of an unsafe condition on the aircraft or at the airport. His alleged damages arise out of the carrier's alleged inadequate provision of ticketing, seating and boarding services and the carrier's exclusion of a belligerent passenger.

Contrary to petitioner's arguments, preemption of claims arising out of ticketing, boarding and seating practices is the one matter on which all courts agree. Indeed, in *Fenn v. American Airlines*, 839 F. Supp. 1218 (S.D. Miss. 1993), cited by petitioner, the United States District Court for the Southern District of Mississippi, although holding preempted the plaintiff's state law claims arising out of the carrier's post-landing treatment of the plaintiff after a fellow passenger accused the plaintiff of criminal conduct, approved of the language in *Hodges*, which recognized that preempted services include items such as ticketing and boarding procedures. 839 F. Supp. 1222-23.

The same is true of the court in *Bayne v. Adventure Tours USA, Inc.*, 1994 WL 9531 (N.D. Tex. Jan. 13, 1994). Contrary

to petitioner's assertions, *Bayne* had nothing to do with ticketing, boarding or seating. The plaintiff claimed that the carrier ignored the plaintiff's complaints about a disruptive passenger and made misrepresentations to the police which caused the plaintiff to be taken into custody, detained and subjected to a luggage search. While the United States District Court for the Northern District of Texas held that the plaintiff's claims were not preempted, it too approved the *Hodges* language recognizing preemption of claims arising out of ticketing and boarding practices. 1994 WL 9531, *1.

In *Doricent v. American Airlines*, 1993 WL 437670 (D. Mass. Oct. 19, 1993), a flight attendant shouted racial epithets at a passenger while he was boarding and stowing away his carry-on baggage. The United States District Court for the District of Massachusetts held that the plaintiff's claims were not preempted. "Racial discrimination . . . [has] nothing whatsoever to do with . . . airline service." 1993 WL 437670, *5. Plaintiff's claims did not relate "to boarding and seating passengers on airline flights." 1993 WL 437670, *6. However, the court recognized that claims are preempted when they have "a 'significant impact' in economic terms over an airline's ability to administer its rates, routes, or services." 1993 WL 437670, *6. This is precisely the matter before this Court. Petitioner attempted to circumvent the frequent flyer system by paying a frequent flyer fare for a first class seat when no frequent flyer first class seats were available. Petitioner then improperly obtained an invalid boarding pass. It is difficult to imagine a claim with a more significant economic impact upon the carrier's ticketing, boarding and seating services and a claimant less deserving of this Court's indulgence.[3]

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[3] TWA maintains that the *Doricent* court's suggestion that only laws having a significant economic impact on a carrier's services are subject to preemption is erroneous. The history of the Federal Aviation Act reveals that Congress was concerned with the quality of service as well as economic stability. *Diefenthal v. Civil Aeronautics Board*, 681 F.2d 1039, 1045-46 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983). *Morales* involved airline *rates*, and for that very reason, must have been

(continued...)

In a desperate attempt to show conflict, petitioner cites two New Jersey Appellate Division opinions – *Miller v. Northwest Airlines, Inc.*, 602 A.2d 785 (N.J. App. Div. 1992), and *Vail v. Pan Am Corp.*, 616 A.2d 523 (N.J. App. Div. 1992). *Miller* was a pre-*Morales* decision, which relied, *inter alia*, on the savings clause contained in the Federal Aviation Act. This Court in *Morales* rejected reliance on the savings clause, noting, "A general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision . . ." 119 L. Ed. 2d at 168. The savings clause was considered as nothing more than a "relic of the pre-ADA/no pre-emption regime." *Id.* Most significant, however, is the fact that in *Vail*, the New Jersey Appellate Division recognized that "*Morales* casts serious doubt on the holding in *Miller*." 616 A.2d at 527. Accordingly, *Miller* is simply bad law and has no bearing on the within matter.

In fact, the New Jersey Law Division, relying on *Morales* and *Vail*, held that a passenger's claim arising out of the carrier's alleged failure to honor a confirmed reservation "beyond a shadow of a doubt 'relates to' airline services". *El Menshawy v. Egypt Air*, 647 A.2d 491, 492 (N.J. Law Div. 1994). The New Jersey Court recognized that "the issue would hardly be debatable if not for *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993)", a case which the court discounted as "a stunning indifference to *Morales*." 647 A.2d at 492.

Similarly, *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1053, which is poorly reasoned and consistently rejected by other courts, is the only case which arguably supports this petitioner's position that there is a direct

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[3](...continued)
evaluated in terms of economic impact. Notwithstanding, TWA maintains that petitioner's claims do have a significant economic impact and are preempted under either analysis.

conflict among existing case law.[4] In *West*, after a remand in light of *Morales*, the Ninth Circuit concluded that plaintiff's compensatory damage claims arising out of his denied boarding on an overbooked flight were not preempted. The court concluded that the plaintiff's claims were too tenuously connected to airline rates, routes or services. 995 F.2d at 151. It is difficult to follow the Ninth Circuit's rationale as applied to a case involving overbooking. It is noted, however, that the Ninth Circuit relied, in part, on an FAA regulation, 14 C.F.R. § 250.9 (1990), which allows, as an alternative, a passenger who is bumped from an overbooked flight to seek damages in the courts. 995 F.2d at 151-52. TWA maintains, and the *West* dissent agrees, *id.* at 152-54, that the FAA regulation is preempted by § 1305. However, the court's reliance on § 250.9 is a better rationale than the court's disingenuous suggestion that a claim arising out of overbooking is too tenuously connected to rates and services. Indeed, the United States District Court for the Northern District of California has concluded that *West* merely "instructs that state-law claims which

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[4] On page 15 and 16 of petitioner's brief, petitioner relies on *Wolens v. American Airlines, Inc.*, 626 N.E.2d 205 (Ill. 1993), *cert. granted*, 62 U.S.L.W. 3556 (U.S. Apr. 4, 1994), for the proposition that a breach of contract claim is not preempted by the statute. The plaintiffs in *Wolens* sought damages for breach of contract and for violation of the Consumer Fraud Act based upon the defendant's retroactive modification of its frequent flyer program. The court held that frequent flyer programs are not "essential element[s]" of airline operations. 626 N.E.2d at 208. Of course, frequent flyer programs encompass much more than airline fares. They include hotel and other awards. *Wolens* did not involve, as this case does, the air carrier's ticketing, boarding and seating services, all of which are clearly essential elements of airline operations. Indeed, the Appellate Court of Illinois, itself, distinguished *Wolens* and held preempted an airline employee's tort claims based upon the airline's failure to seat the employee's daughter on an international flight. *Pearson v. Lake Forest Country Day School*, 633 N.E.2d 1315 (Ill. App. Ct. 1994). The court held that "boarding and seating practices are not peripheral to the operation of an airline" as are frequent flyer programs. *Pearson*, 633 N.E.2d at 1320. Also significant is that petitioner fails to note that this Court has once again granted review of the Illinois court's decision in *Wolens*. 62 U.S.L.W. 3556.

are explicitly recognized by controlling federal agency regulations are still viable." *Federal Express Corp. v. California Public Utilities Commission*, 1993 WL 399380 at *5-6 (N.D. Cal. Sept. 23, 1993). *See also Pearson v. Lake Forest Country Day School*, 633 N.E.2d 1315 (Ill. App. Ct. 1994) (distinguishing *West* and holding § 250.9 inapplicable where passenger did not hold a confirmed reservation and was not bumped from the flight as a result of overselling). In the within matter, there are no federally-recognized state law claims.

West is poorly reasoned and inconsistent with *Morales* and post-*Morales* decisions. Of *West*, the Fifth Circuit noted: "Under either *Morales* or the analysis we would prefer, it is difficult to see how a lawsuit for overbooking would not 'relate to' airline 'services.'" *Hodges*, 4 F.3d at 356. *See also Doricent*, 1993 WL 437670, *6 (recognizing that claims arising out of overbooking so "significantly affect an airline's ability to perform its 'services'" so as to be preempted); *El Menshawy v. Egypt Air*, 647 A.2d 491, 492 (N.J. Law Div. 1994) (*West* majority's suggestion that passenger's claim was too tenuous or remote to airline services or even a borderline question "constitutes a stunning indifference to *Morales*").

The irrational analysis of *West* which has been consistently rejected by other courts, demonstrates that there is, indeed, no conflict on the issue of preemption as it relates to claims arising out of ticketing, boarding and seating services, as does this petitioner's claims. Indeed, it appears that the courts all agree that this petitioner's claims are and should be preempted.

This case involves a passenger disgruntled by the carrier's ticketing, boarding and seating practices. Petitioner's belligerent behavior resulted in his exclusion from the flight. It is difficult to imagine claims more related to an air carrier's services. Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

It is clear that there are no conflicting decisions as to whether claims, such as this petitioner's claims, which arise out of ticketing, boarding and seating services are preempted. Indeed, this is one issue on which the courts seem to agree.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

SHANLEY & FISHER, P.C.
Attorneys for Respondent
Trans World Airlines, Inc.

By:_____
John D. Clemen

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 89-1910(MTB)

JOHN FRESSIE,	:	DEPOSITION UPON ORAL EXAMINATION OF DIANA J. MAGADAN
Plaintiff,	:	
v.	:	
TRANS WORLD AIRLINES and DIANA MAGADAN, Individually,	:	
Defendant.	:	

T R A N S C R I P T of the stenographic notes of the proceedings in the above-entitled matter, as taken by and before FREDERICK L. GOLDBERG, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, at the offices of Shanley & Fisher, Esqs., 131 Madison Avenue, Morristown, New Jersey on Thursday, January 18, 1990, commencing 10:15 a.m.

***crew spoke to him.

Q. Did he ever leave the cockpit?

A. Not to my knowledge.

Q. After the disorderly summons and complaint was signed, which I believe occurred on the evening of October 15th, were you ever contacted by either representative of TWA or anyone else, either from the DA's office, as to whether or not you wanted to pursue the matter?

MR. SHAPIRO: During what period of time?

MR. FRICKE: After October 15, 1988 and prior to February 2, 1989.

MR. SHAPIRO: Okay.

A. No.

Q. On February 2, 1989, were you in the Queens criminal court prepared to testify in behalf of TWA and for the people of New York?

A. Yes.

Q. Did you testify?

A. No.

Q. What is your understanding as to what happened on that date?

A. My understanding as what happened on that date was that there had been two prior court appearances or dates that I was totally unaware of and that on this date the DA was supposed to be prepared to provide a case. And since I

was the only person there, I could not testify to any hearsay and, therefore, she was not prepared to go to trial and it was dismissed because Mr. Fressie could not have a speedy trial.

Q. That was your understanding?

A. My laymen's understanding of it, yes.

Q. You do know, in fact, that the matter was dismissed?

A. Yes.

Q. Okay.

Have you -- prior to this occasion in your employ for TWA -- ever sworn out a criminal complaint against a passenger?

A. No.

MR. SHAPIRO: Occasion being October 15th or February 2?

MR. FRICKE: The only time that one was sworn out was on October 15th.

MR. SHAPIRO: Okay.
May not necessarily refer to that antecedent date.

MR. FRICKE: All right.

A. (Continuing) I really don't recall, but I don't believe so.

CERTIFICATE

I, FREDERICK L. GOLDBERG, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the proceedings in the above-entitled matter as reported by me stenographically on the date and at the time and place hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither of counsel nor attorney for any party in this action, and that I am neither a relative nor employee of such counsel or attorney, and that I am not financially interested in the action.

FREDERICK L. GOLDBERG, C.S.R.
Certificate No. XI00274
Notary Public of the State of New Jersey
My Commission Expires May 19, 1992

DATED: February 9, 1990